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MICHIGAN HOUSE OF REPRESENTATIVES

JIM RUNESTAD

STATE REPRESENTATIVE

Dear Chairman Graves and Members of the Oversight Committee,

Thank you for the opportunity to submit this testimony before the Committee on my legislation, House Joint Resolution P, which would put before the people of Michigan a constitutional amendment to reserve to the Legislature the power to provide by law the protection of the First Amendment at our public institutions of higher education.

An amendment to our State Constitution is a serious proposition. It must resolve a systemic flaw in the very framework of our legal system that causes such harm as to merit the attention of every voter in the State to its resolution.

This is such an issue.

I introduce this amendment to our State Constitution with terrible sadness. The right to free speech, the value of the free exchange of ideas, the importance of debate... I once believed that all civilized people understood and even took for granted how essential these principles are to civil society.

It is sad that we must now debate whether we need to intervene to ensure our institutions of higher education can protect the peace when one group of students invites a speaker that offends another.

Many aspects of law are constantly adapting with the development of technology. The state of patent law will be turbulent for the foreseeable future. Free speech on campus is not a novel issue, not unique to this age, and could have been resolved long ago.

Instead, we are not only still grappling with the question of what policy framework will best protect the constitutional rights of students at state colleges, but whether we even have the power to do so.

We should be alarmed that something so basic as the right to free speech on public property is the focus of so much controversy. It's no longer about one incident or another; it's a much broader climate of censorship, one that we should all find abhorrent to civil society and anathema to the mission of an institution of higher education.

University of Michigan has hiring "bias police" to collect reports of "bias" on campus—a much broader term than "stigmatizing" or "victimizing"—and presumably take steps to exterminate such heresies from their campus.

This comes on the heels of a recent incident in which the President of the University of Michigan encouraged students to tear down posters placed by other students, if they find them "offensive," and even offered to be their personal bodyguard while they did so. (See Attachment 2.)

Just a couple of years ago, Western Michigan University settled a lawsuit in which they prohibited a radical leftist musician from playing a concert on their campus.

And this past year Grand Valley State University settled a free speech lawsuit out of court.

On top of all this, there are problems with universities lacking a consistent definition of "harassment" and policies that protect the rights of students—the right to free speech as well as the right not to be harassed. This despite clear guidance from the courts (See Attachment 3.)

This large volume of incidents across so many public colleges and universities in our State clearly demonstrates that the issue is not a small set of isolated incidents.

It's also dubious that colleges and universities were simply unaware that their policies infringed up these students' rights. In the case against Macomb Community College, I note that a student not involved in that case submitted testimony to Congress when the Ways and Means Subcommittee on Oversight held a hearing last year (see Attachment 2.) This testimony was cited by my colleague, Representative Reilly, in his own testimony before the Senate Judiciary Committee earlier this year. It's therefore highly unlikely that the college was unaware its speech policies were already under scrutiny before this latest lawsuit was brought to them.

Will the colleges' speech codes stand up to any of these challenges? Unlikely, given case history. I citing Rep. Reilly's testimony to the Senate earlier this year: [begin citation]

See *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967, at *18 (S.D. Ohio June 12, 2012): "Open, outdoor areas of public campus are designated public forum as to students."

See also: *Roberts v. Haragan*, 346 F. Supp. 2d 853, 862-63 (N.D. Tex. 2004):

"The mere fact that the University owns all the land within its boundaries does nothing to change the equation. First Amendment protections and the requisite forum analysis apply to all government-owned property; and nowhere is it more vital, nor should it be pursued with more vigilance, than on a public university campus where government ownership is all-pervasive."

See also: *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012): "Because the perimeter sidewalks at [Tennessee Technological University] blend into the urban grid and are physically indistinguishable from public sidewalks, they constitute traditional public fora."

See also: *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir. 1992). "[T]he undisputed facts show that the outdoor grounds of the [Southwest Texas State University] campus such as the sidewalks and plazas are designated public fora for the speech of university students."

See also: *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981): "With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."

Furthermore, the courts have held that university policies that abridge the right to free speech on campus are not only unconstitutional, but create grounds for injury.

See *Brister v. Faulkner*, 214 F.3d 675, 683 (5th Cir. 2000). Finding that grounds near a public sidewalk of University of Texas at Austin constituted traditional public forum for nonstudents, the Court noted that "it is of little consequence that the university's officers first warn the protesters before they arrest them. The constitutional right to free speech suffers injury when this impermissible amount of doubt is introduced, and when constitutional expression is chilled."

Not only have the courts consistently recognized the right to free speech on college and university campuses, but one case against the University of Michigan specifically addressed the question of whether or not speech that might be construed as "hate speech" was not protected by the First Amendment rights accorded to citizens under the Constitution of the United States.

In *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich 1989), the U.S. District Court held:

It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values. Recently, the University of Michigan at Ann Arbor (the University), a state-chartered university, see Mich. Const. art. VIII, adopted a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy) in an attempt to curb what the University's governing Board of Regents (Regents) viewed as a rising tide of racial intolerance and harassment on campus. The Policy prohibited individuals, under the penalty of sanctions, from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. However laudable or appropriate an effort this may have been, the Court found that the Policy swept within its scope a significant amount of "verbal conduct" or "verbal behavior" which is unquestionably protected speech under the First Amendment.

[end citation]

This last case is especially interesting because the University of Michigan at Ann Arbor is presently hiring "bias police" to investigate, and presumably exercise disciplinary power to restrict, incidents of "bias"—a much broader term than "stigmatizing or victimizing" speech.

This is an egregious example of a public university adopting an unconstitutional speech policy in violation of a court ruling against the very same university.

The Michigan Legislature Has Authority to Enforce the Constitution of the United States and the Constitution of Michigan on Campuses

Article 8, Sections 5 and 6 of the Michigan Constitution grant the public universities broad authority over their own affairs. ("Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds.")

This has been interpreted in many court cases to preclude the legislature from directing campuses on particular policy questions. "General supervision" includes such things as course requirements, tuition rates, academic programs, and so forth.

However, the courts have not found the universities completely autonomous, and have upheld the authority of the Legislature to regulate basic aspects of law:

See 55 Mich L Rev 728, 729-730 (1957) as follows (emphasis added):

> *While it must be recognized that the legislature's power to make appropriations to a constitutional university does not include and is separate from the power to control the affairs of such a university, the legislature can within reason attach conditions to its university appropriations. If a constitutional university accepts such conditioned funds, it is then bound by the conditions. There are not many decisions in this area, however, so the line between conditions the legislature can validly attach and those it cannot has not been drawn in a distinct fashion.*
>
> *Conditions which require the university to follow prescribed business and accounting procedures have generally been found to be valid. The courts have also sustained conditions which require, on penalty of losing part of the appropriation, annual reports to the governor, and fair and equitable distribution of an appropriation among the departments of the university or maintenance of university departments. It has also been held that the legislature can properly make non-teaching employees subject to the state's workmen's compensation law, and can require loyalty oaths by the teachers.*
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> *On the other side of the line, a condition that the university move a certain department of the school has been held to be invalidly attached, and an attempt to limit the amount of the funds that can be spent for a given department is likewise an invalid condition. It is clear that limits should be placed on the use of the conditioned appropriation, for without such limits the legislature could use the conditioned appropriation to strip the university of its constitutional authority.*

If the Legislature has the authority to require universities follow prescribed business procedures and require loyalty oaths by teachers, it is certainly reasonable to believe that the Legislature has the authority to ensure that students' First Amendment rights are protected.

Particularly, legislation that would essentially codify existing court rulings on students' right to free speech is, in my opinion, absolutely constitutional today.

State universities often claim that the finding of one case, *Federated Publications Inc. v. Board of Trustees of Michigan State University,* grants the state universities unlimited autonomy from legislative oversight. This is not accurate. The *Federated Publications* case dealt with the question of whether the MSU Board of Trustees process of selecting a university President could be made subject to the Open Meetings Act. In the ruling it is plainly stated that the Legislature lacked such power because the selection process was an internal affair of the university. This is consistent with case history.

In fact, the ruling stated: "Although state universities have been held to be distinct governmental bodies coequal with the Legislature, they have not been held constitutionally immune from all regulation by the Legislature. In *W.T. Andrew Co., Inc. v. Mid-State Surety Corp.*, 450 Mich. 655, 668-669, 545 N.W.2d 351 (1996), the Court held that, although the University of Michigan was a constitutionally created corporation, the public works bond statute could be applied to it through the Legislature's police power. It found that statutes that are designed for the benefit of society as a whole can be imposed on a constitutionally created university when those statutes pose no direct threat to the university's financial autonomy. [Emphasis added.]

Based on case history, legislation that would simply codify the rulings of the free speech cases cited above—by prohibiting universities from restricting speech by time and place, or requiring approval, or requiring universities to adopt a free speech policy and make that policy known to students and faculty—would clearly be constitutional today.

However, not all proposed policies to protect free speech are so cut-and-dried.

For example, consider the problem of the so-called "heckler's veto." This is when someone is prevented from speaking by the threat of violence their speech would provoke. It would more accurately be called the "terrorist's veto," because using the threat of violence and threats of violence to achieve a political outcome is the very definition of terrorism. At Michigan State University, a controversial speaker was told he was unable to speak at the university, not because he was not invited by any students, but specifically because the university was unable to provide for the public's safety at his event.

It is simply not believable that a campus police lacks the ability to protect the peace in situations like these. However, because the chief of campus police serves at the pleasure of the campus administration, it is entirely believable that the decision was made by administrators to use concern for student safety as a pretext to deny the speech rights of the speaker.

Legislation to prevent university administrators from neglecting to protect the peace on their campus could take a variety of forms. It could prohibit the administration from disciplining or firing a peace officer for protecting the peace. It could prohibit excessive security fees for events. It could require the administration suspend or expel students that commit crimes against the speech rights of other students.

The constitutionality of such legislation is untested. It could be interpreted as constitutional as a necessary measure to defend the constitutional rights of citizens, or it could be interpreted as a too-specific regulation of campus affairs.

My amendment would clarify that the Legislature has full authority to implement policies necessary to protect the First Amendment rights of students.

This authority is obviously necessary, as our public colleges and universities have consistently demonstrated a hostility to free speech and a refusal to follow the guidance of courts.

In the pending case at Kellogg Community College, the College argues in court filings that it is a "limited public forum" for its students. In all of the cases cited above, courts have held that public colleges are public fora. Not "limited" public fora. As Alliance Defending Freedom, representing the plaintiffs, noted in their reply to the college's response to their request for a preliminary injunction, the case has all of the same basic elements as *University of Cincinnati Young Americans for Liberty v. Williams*. (See Attachment 4.)

As this is issue is litigated and re-litigated, the courts have consistently held that students have a right to free speech on campus and that campuses are public fora for their students. Taxpayer money is wasted in these lawsuits, and in the Kellogg case students' lives were wrongly disrupted.

The Macomb Community College lawsuit is particularly disturbing because the college should have been well aware by the time of the incident that its speech policies were under scrutiny. They were named in testimony submitting to a Congressional hearing on this issue last year. (See Attachment 5.)

It is necessary and proper for the Legislature to intervene and prevent future incidents from occurring. The Legislature is the one and only body with the ability to create a policy framework that protects the constitutional rights of Michigan citizens.

It is a compelling interest that students at our taxpayer-funded schools have an environment where free inquiry and debate are basic rights. A campus where ideas are unwelcome, where viewpoints may be labeled "hate" and hatefully attacked, where political terrorism is condoned, is a disgrace to Michigan and a disgrace to our free country.

We should act quickly to defend and restore the right to free speech and the free exchange of ideas and bring peace to our college campuses.

Thank you for allowing me the opportunity to testify on this matter.

Sincerely,

Representative Jim Runestad